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IN THE

Supreme Court of the United States

CATHOLIC CHARITIES OF
THE DIOCESE OF ALBANY, *et al.*,

Petitioners,

v.

ERIC R. DINALLO, SUPERINTENDENT,
NEW YORK STATE INSURANCE DEPARTMENT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NEW YORK COURT OF APPEALS

SUPPLEMENTAL BRIEF FOR RESPONDENT

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I

This supplemental brief is submitted pursuant to Supreme Court Rule 15(8) in response to a brief filed by a group of amici curiae in support of the petition for a writ of certiorari. Amici's brief was filed on the same day that respondent filed its opposition and presents a claim not addressed in the petition.

Amici argue that this Court should grant a writ of certiorari to consider whether the religious employer exemption in the Women's Health and Wellness Act ("WHWA")[1] contains "'denominational preferences.'" Amici Br. 15 (citing *Larson v. Valente*, 456 U.S. 228, 246 (1982)). Amici do not identify whether they seek review of the state court's Free Exercise Clause holding (Pet App. 5a-9a) or its Establishment Clause holding (Pet. App. 14a-15a), but in either case, a denominational preference argument was not presented in the petition and so is not before this Court.

Even if amici's attempt to seek review of a question not fairly encompassed within the petition were cognizable – which it is not – amici's religious gerrymander claim still would not merit certiorari review. Amici do not identify a circuit split, nor could they, because as they themselves assert, the governing standards are settled. *See* Amici Br. 5, 12-13. Amici seek only error correction, arguing that the New York Court of Appeals failed to properly apply this Court's precedents to the WHWA's religious employer exemption.

Moreover, even if the Court were inclined to grant a writ of certiorari for that purpose, such an error could not properly be considered in this case because petitioners conceded in the Court of Appeals that the religious employer exemption does not expressly prefer or disadvantage one church over

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1. *See* N.Y. Ins. Law §§ 3221(l)(16)(a)(1), 4303(cc)(i)(A) (Pet. App. 97a, 99a).

another, *see* NYCA Reply Br. 29.[2] It is no surprise that petitioners have failed to raise this claim in the petition, because a successful challenge to the scope of the religious employer exemption could, under New York law, result in severance of the exemption from the WHWA. *Cf. Larson*, 456 U.S. at 255 (affirming the Court of Appeals' decision to sever under state law a religious exemption that violated the Establishment Clause). This result would not benefit petitioners and would harm their affiliated churches, which can currently take advantage of the exemption.[3]

REASONS FOR DENYING CERTIORARI TO REVIEW AMICI'S NEW CLAIM

1. This Court should decline amici's invitation to review a claim different from the ones presented in the petition, based on a wholly different constitutional theory, and presenting the prospect of a drastically different remedy. An amicus brief in support of a petition for certiorari is an inappropriate vehicle to expand the petition by presenting a question that no party has raised. As this Court has consistently affirmed, it is the petitioner who "controls the scope of the question presented." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992). While the question presented includes "subsidiary question[s]," *id.*, amici's denominational preference claim

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2. "NYCA Reply Br." refers to the Reply Brief filed by plaintiffs-appellants in this action in the New York Court of Appeals.

3. Amici's first argument challenging the religious employer exemption, Amici Br. 9-12, is beyond the scope not only of the petition but also of the issues litigated by the parties below. It is also mistaken. There is no conflict between the decision below and the Third Circuit cases cited by amici. Those cases hold that when a general law provides discretionary exemptions for secular reasons it must also provide exemptions for claims of religious hardship. They have no application to the WHWA, which does not provide for individual exemptions on secular grounds.

is neither encompassed within the scope of the question presented, nor is it subsidiary to it.

Petitioners expressly limited the scope of their petition to claims challenging the burden imposed on their free exercise of religion and other First Amendment rights, and did not argue that any provision in the WHWA gives a preference to certain religions or otherwise imposes a religious gerrymander. Petitioners asked this Court to consider: (1) whether the contraceptive coverage provision gives rise to the "hybrid rights" situation that might warrant strict scrutiny under *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990), because it involves infringement on religious practice together with "not insubstantial" speech and association claims (Pet. 13, 19-20); (2) whether the contraceptive coverage provision interferes with petitioners' rights of free speech and association by coercing petitioners to financially subsidize and therefore "endorse" contraceptive use (Pet. 13-19); (3) whether the contraceptive coverage provision infringes petitioners' right to institutional autonomy by regulating an aspect of their relationship with their employees (Pet. 20-23); and (4) whether the WHWA is invalid under *Smith*, even though neutral and generally applicable, because it "operates in a decidedly irrational manner" and "unnecessarily infringes petitioners' free exercise rights" (Pet. 23-27).

Petitioners discuss the religious employer exemption – which is at the heart of amici's denominational preference claim – only with respect to this final ground for granting a writ of certiorari. But unlike amici, petitioners do not argue that the scope of the exemption creates a sectarian preference or otherwise strips the law of its neutrality or generality. They argue instead that denying an exemption to *any* employer who opposes contraceptives on religious grounds renders the law irrational, and thus invalid under their reading of the *Smith* standard for neutral, general laws. In petitioners' view,

refusing to exempt any religious employer from the requirement to include coverage for prescription contraceptives in its prescription drug plan irrationally "undercuts the objective of the law" to advance women's health, in that the exemption allegedly creates an incentive for those employers to withdraw prescription drug coverage altogether. (Pet. 26).

As part of arguing the law's irrationality, the petition asserts in a footnote that the lower court's finding that the law is neutral and generally applicable is "questionable" because the contraceptive coverage requirement applies only to employers who choose to provide prescription drug coverage in the first place, and because the law contains an exemption from that requirement. (Pet. 24 n.16). But the petition pointedly does not ask this Court to review the law's neutrality or general applicability, and does not challenge the scope of the exemption. Rather, the question for which petitioners seek review presupposes the WHWA's neutrality and general applicability.

Amici make the fundamentally different argument that the exemption creates denominational preferences by exempting from the Act's contraceptive coverage provision those religious entities that amici term "inward-looking," while leaving out those it considers "outward-looking." Amici Br. 13, 15-16. While amici do not state which holding of the decision below they are challenging, or on what doctrinal basis, their brief cites primarily to the free exercise holding of the New York Court of Appeals. Amici Br. 14-15, 17. It appears, therefore, that they claim that the religious employer exemption renders the WHWA not "neutral" or "generally applicable" under the *Smith* standard. That claim is beyond the scope of the petition, no matter how broadly the petition is construed. As discussed above, the petition does not ask this Court to review the lower court's holding that the WHWA is a neutral law of general applicability.

Petitioners instead complain that the court, having made that finding, upheld the law with no further review into its rationality. (Pet. 23-27).

Amici fare even worse if their claim is characterized as resting on the Establishment Clause, although that is a closer doctrinal fit to their constitutional challenge. *See Larson*, 456 U.S. at 244-50 (analyzing denominational preference challenge to religious exemption under the Establishment Clause); *see also Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 334-39 (1987) (reviewing challenge to religious exemption under Establishment Clause); *Walz v. Tax Comm'n*, 397 U.S. 664, 672-80 (1970) (same); *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (explaining that government efforts to benefit particular religions are generally reviewed under the Establishment Clause). The petition does not contain any Establishment Clause challenge, and perhaps for that reason amici have not explicitly invoked the Establishment Clause, although they rely heavily on *Larson* and other cases decided under that provision.

Amici's claim is flatly inconsistent with the strategic choice embodied in the petition not to assert a claim of denominational preference. The incompatibility of the two claims is even more stark when the potential remedies are considered. Amici's view, if accepted, could lead to severance of the exemption, to the detriment of petitioners' affiliated churches. By contrast, the petitioners' claims, if accepted, would result in invalidation of the contraceptive coverage requirement itself. That petitioners have made a strategic choice not to present amici's denominational preference claim is confirmed by the fact that petitioners did not adopt the claim even in their reply brief, which was filed after a full opportunity to consider and evaluate amici's arguments.

This Court has routinely refused to "consider questions outside those presented in the petition" even with a petitioner's

express consent. *See, e.g.*, *Yee*, 503 U.S. at 535. Here, petitioners' apparent refusal to join in amici's new claim presents an especially compelling reason for this Court not to consider the claim raised in the amicus brief. Because under any formulation, amici's new claim was not set forth in the petition or "fairly included therein," it should not be considered by this Court. Sup. Ct. R. 14.1(a).

2. Even if amici's arguments were encompassed within the petition, amici's claim still would not merit review. There is no circuit split as to the standard for identifying a religious gerrymander. As amici recognize, that standard has long been settled. Amici Br. 5, 12-13. Amici seek nothing more than routine error correction because in their view, the New York Court of Appeals made a mistake in applying this Court's clear and uncontroverted precedents to the facts of this case.

But the Court of Appeals made no error. Instead, it correctly applied this Court's precedents in concluding that the contraceptive coverage provision is neutral and generally applicable, and that the religious employer exemption does not prefer one religious denomination over another.

The Court of Appeals correctly held that the contraceptive coverage provision is a neutral law of general applicability that requires all employer health insurance policies to include in their prescription drug plans coverage for prescription contraceptives. (Pet. App. 6a). Religious beliefs were not the law's "'target,'" the court found, "and it was plainly not that law's 'object' to interfere with plaintiffs' or anyone's exercise of religion." (*Id.*). "Its object was to make broader health insurance coverage available to women and, by that means, both to improve women's health and to eliminate disparities between men and women in the cost of health care." (*Id.*).

In addition, the Court correctly held that the law's exemption for some employers who oppose contraceptives on religious grounds does not alter the contraceptive coverage provision's neutrality or generality. (Pet. App. 6a). Even taking into account

the limited exemption for religious employers, the WHWA is still "generally applicable and neutral between religions" (Pet. App. 14a), and was not designed to give official preference to one religious denomination over another (Pet. App. 14a (citing *Larson*, 456 U.S. at 244)).

Amici's attempted analogy to the religious exemption struck down as a religious gerrymander in *Larson* fails. *See* Amici Br. 14-16. *Larson* involved a state statute that imposed reporting requirements on charitable organizations that solicit funds, and exempted religious organizations that received more than half of their total contributions from members and affiliated groups. The statute was challenged as an establishment of religion by members of the Unification Church, which did not qualify for the exemption. This Court held that the statutory scheme was an unconstitutional establishment of religion because the purpose and effect of the limited religious exemption was to impose the reporting requirement on the Unification Church and similar relatively new religious denominations while exempting the Roman Catholic Church and other established religious denominations. 456 U.S. at 253-54. While one of the dissenting opinions disputed this conclusion as a factual matter, *id.* at 260-61 (White, J., dissenting), both the majority and that dissent made it plain that this factual conclusion was the lynchpin of the ruling, *id.* at 254, 263.

The flaw identified in the statute at issue in *Larson* was that, without compelling justification, it "makes explicit and deliberate distinctions between different religious organizations" – namely, between well-established churches that have strong financial support from the members, and churches that are new and for that reason or as a matter of policy rely on public solicitation more than on financial support from members. *Id.* at 247 n.23. The Court unambiguously found, based on the text of the statutory exemption and a comparison with the prior more expansive version that it replaced, that "the fifty per cent rule's capacity – indeed its express design – [was] to burden or

favor selected religious denominations." *Id.* at 255. Because the Court found that the statute deliberately targeted disfavored religious groups, it could not qualify as "a facially neutral statute, the provisions of which happen to have a 'disparate impact' upon different religious organizations." *Id.* at 247 n.23.

Larson was an Establishment Clause case, but the selective targeting of a disfavored religious group may also be the basis for finding a violation of the Free Exercise Clause. In *Church of the Lukumi Babalu Aye*, this Court invalidated on free exercise grounds a city ordinance prohibiting the ritual slaughter of animals, largely because the Court found that the ordinance targeted the religious practice of the Santeria religion, with the purpose and effect of suppressing the central element of that religion's worship service. 508 U.S. at 534-42.

Unlike the laws at issue in *Larson* and *Church of the Lukumi Babalu Aye*, the WHWA's exemption for religious employers who are opposed to contraceptives on religious grounds is not targeted at particular religious denominations. The WHWA's operation, purpose, and legislative history all point to its denominational neutrality. (Pet. App. 14a, 41a-42a). Petitioners acknowledged as much when they conceded in the New York Court of Appeals that the WHWA "does not explicitly prefer one Church over another, and its criteria do not disadvantage all branches of any Church." NYCA Reply Br. 29.

Instead, the New York statute at issue in this case more closely resembles the statute upheld in *United States v. Lee*, 455 U.S. 252 (1982). At issue in *Lee* was a federal statute that exempted from Social Security taxes individual self-employed members of a religious sect that conscientiously opposes insurance, but did not exempt employers or employees in an employment relationship. Like the WHWA, the statute in *Lee* created an exemption for religions with a conscientious objection to the statutory requirement, but imposed a limitation on the exemption. The limitation in *Lee*, like the limitation in this case,

could conceivably have the effect of imposing greater burdens on some religious sects than others, depending on the employment practices of their members, but the record does not establish that it in fact draws denominational lines, either on the face of the statute or in its practical effect. In particular, the Court noted that it exempted the self-employed Amish but not all Amish employers or employees. In rejecting the claim that this limited exemption violates the Free Exercise Clause, the Court observed:

> When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.

455 U.S. at 261. *Lee* held that the Free Exercise Clause did not require exempting a religious employer from social security taxes, because such an exemption would "impose the employer's religious faith on the employees." *Id.* Similarly in this case New York has exempted from the WHWA certain religious employers that interact principally with members of their own religion, but not those that employ or serve substantial numbers of nonmembers. In light of *Lee*, New York was entitled to conclude that the Free Exercise Clause did not require exempting all religious employers from the WHWA because such an exemption would impose the employer's religious faith on the employees.

Nothing about the WHWA targets any particular religion, nor does the WHWA's exemption categorically include or exclude all activities of any particular religion. To the extent that the WHWA's exemption excludes some religious entities, it does not do so on sectarian grounds, but rather on the basis of denominationally neutral factors that apply evenhandedly across denominational lines. *See Cutter v. Wilkinson*, 544 U.S. 709,

724 (2005) (A law does not establish religion where it "confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment."). The exemption has the purpose and effect of accommodating any and all religious organizations whose employment practices and operations minimize the harms that the WHWA was enacted to counteract, as determined by broad and objective denominationally neutral categories drawn to avoid an "intrusive inquiry into religious belief," *Amos*, 483 U.S. at 339.

Thus, as with New York's religious property tax exemption upheld in *Walz*, and the Social Security exemption upheld in *Lee*, the New York Legislature in this statute struck a constitutionally valid balance among several important objectives: advancing the public health and welfare, accommodating religious practice, and avoiding excessive government entanglement with religion. This Court has long emphasized that "'there is room for'" ameliorative statutes like the WHWA that "'allow[] the government to accommodate religion beyond free exercise requirements, without offense to the Establishment Clause.'" *Cutter*, 544 U.S. at 713 (quoting *Locke v. Davey*, 540 U.S. 712, 713-14, 718 (2004)); *see also Walz*, 397 U.S. at 673. The WHWA does precisely that. Accordingly, amici's claim merits no further review.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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